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23 March 1978

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MEMORANDUM FOR: Office of Legislative Counsel

ATTENTION :

FROM :

Assistant General Counsel

SUBJECT : S. 2525 - Title I - Issues Paper

1. The following comments and suggestions are provided in response to your 17 March 1978 Issues Paper concerning Title I of the proposed intelligence charter legislation.

2. Technical Suggestions Paper (Please note that the comments concerning Section 151 (4th & 5th paras below) are more substantive than "technical.")

- Para 13 - "entity is" should be "entity's."

- Para 20 - there is a federal crime of murder in the first degree at 18 U.S.C. §1111. The proposed revision of the criminal code, S. 1437 at §1601, would "grade" murder as a Class A felony.

- Para 22 - the citation should be to "Section 136," there is no subsection (f).

- Para 25 - the suggested amendment to Section 151(d)(5) should be "(5) review periodically the practices and procedures of the inspectors general of the entities of the intelligence community to discover, investigate, and report, and the practices and procedures of the general counsels of such entities to discover, request investigations by the inspectors general, and report, intelligence activities that raise questions of legality or propriety."

- Para 25 - the amendment of 151(e)(4) should be "(4) formulate practices and procedures to accomplish the responsibilities of the inspectors general to discover, investigate, and report, and of the general counsels to discover, request investigations, and report, intelligence activities that raise questions of legality or propriety."

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3. Issues Paper

- Para 4 - since the bill envisions, in Section 142, a comprehensive policy-making apparatus in this area, the definition of communications security should include not only the protection which results from measures taken to deny unauthorized access and insure authenticity, but also the measures themselves. Also, since Section 142(b)(5) and (c) relate to private communications, it is unclear why the definition is limited to "national security-related" communications.

- Para 5 - the last clause of 104(5) must also be revised to conform to the suggested amendment. Also, to conform to E.O. 12036, 4-202, the phrase, "but not including personnel, physical, document or communications security programs" should be added at the end of the definition.

- Section 104(8) - the definition of "counterterrorism intelligence" should read: "information pertaining to the capabilities, intentions or activities of any foreign power, organization, or person in the field of international terrorist activities."

- Para 9 - the proposed combination of existing subparagraphs in 104(16) should be designated as subparagraph (G) and it should be noted that the existing (L) and (M) would become (I) and (J), respectively. Also there should be a reference to para 18 and a new para between existing paras 13 and 14 regarding Section 104(24) which should also refer to para 18. This would tie together the interrelationships you are trying to establish between the definitions of "intelligence community" "national intelligence budget" and Section 112.

- Para 10 - the definition of "intelligence method" should be simply "any human, technological, or other means utilized in the conduct of any intelligence activity." The latter term is all-encompassing (the alternative would be to include "special activities" in the enumeration of method contexts), and this definition will include support and related activities which precede collection, etc.

- Para 11- the explanation here might be more clear were "such activities" to be replaced with "the broadest range of activities which relate to or affect national intelligence activities."

- Para 12 - "intelligence source" in 104(19) should be defined simply as "any human, technological, or other means by or from which is derived information relating to any intelligence activity" for reasons similar to those cited in para 10 above.

- Para 15 - delete the "not" following "the definition should exclude associations ..." The parenthetical reference in 104(3)(B) might be more useful were it changed to "(as defined in 8 U.S.C. 1101)."

- Para 15 - the attached definition of "U.S. person" from the Agency's proposed electronic surveillance procedures may be suggested as an alternative to all of 104(3).

- Para 16 - the point is that "intelligence activity" includes all the activities specified, in addition to foreign intelligence activities, which are omitted.

- Para 18 - the second sentence should state "... will also include those programs designated under subparagraphs 104(16)(G) (as suggested in para 9 above) and 104(16)(J) (now (M)); ... the determinations in 104(16)(G) and (J) and 104(24)(G)"

- Para 19 - there should be added to the parenthetical in the second sentence "and the NSC."

- Para 20 - the suggested amendment should begin with "and to perform ..." rather than "shall."

- Para 21 - the addition should be to the third sentence of 113(a).

- Section 133(b) - why not suggest that the limitation on the number of terms be lifted. Since the Senate will advise and consent to reappointment every six years there seems to be no good reason to limit tenure arbitrarily. The second term, otherwise, would involve a "lame duck" DNI who might have less incentive as a consequence.

- For uniformity, 133(e) should refer to "a commissioned officer of the Armed Forces" rather than "military."

- Section 133(f) should become a subsection (4) of 133(d).

- Para 22 - the proposed amendment should be "and the coordination of those activities with similar activities conducted abroad by the other departments and agencies."

- Section 114(f)(1) - it should be made clear that the references to providing intelligence to Congress here and in 103(4) and 413(c) are limited to finished intelligence products and do not imply legislative authority to levy requirements or collection "tasks" on the Agency.

- Para 25 - the last sentence should state "The requirement to report liaison agreements to the intelligence committees should extend only to those agreements which might be fairly required to be reported under the Case Act, 1 U.S.C. 114, i.e., only written agreements which govern the overall relationship and so approach the status of "international" in nature, and only within 60 days after its effective date; the provision should specify as well that this reporting will be in lieu of ... under the Case Act."

- Para 26 - 114(l) should also be modified to provide the DNI with the same authority to protect employees, functions, etc., for the DNI's office, as is provided in 421(g) for CIA. Also there should be added, after "responsible," "by appropriate means including the approval of security clearances and access to such information, ..."

- Para 32 - the last reference in the first sentence should be to subsection "(m)" rather than "(n)". The last sentence should be replaced with "It is the intention of subsection (m) that separations under that provision, as opposed to terminations under subsection (n), would be for non-security reasons (e.g., reductions, reorganizations), would be less than summary, and would be conducted in accordance with procedural requirements provided under internal regulations."

- Para 33 - 114(o) should be revised in part to read:

(o) Any officer or employee of the Office of the Director, including those separated under subsection (m) or terminated under subsection (n), The Civil Service Commission shall consider such officer or employee for positions in the competitive civil service in the same manner as if transferring between two positions

This will make it clear that all employees are allowed this benefit, not only those separated or terminated.

- Para 35 - the addition should state "and to perform such functions...."

- Para 37 - "the" should be inserted after "transfer" in the proposed 117(a). The words "or employee" should be deleted from 117(a)(2). A new subsection should be added, preferably as (1), to the effect that "such person shall retain the position and authorities of the Deputy or Assistant Director, as appropriate, but otherwise shall serve only as the head of the CIA;" Also, it might be wise to allow a similar Presidential re-transfer of this responsibility.

- Para 38 - "do" should be inserted after "Intelligence Community" in the last paragraph. 121(c) could be modified as you suggested by inserting ", reprogramming," after "internal program."

- Para 41 - (should be 40) the context of 122(a) is such that the change suggested is not as appropriate as inserting "such" after "unless" and deleting "for such activity."

- Para 41 - the suggested clarification of "authorized by Law" is not necessary since the obvious intention of that requirement is to allow unvouchered expenditures only for activities authorized to be undertaken by an entity of the intelligence community. The second paragraph should note the alternative of limiting this DNI authority to the Office of the DNI.

- Para 48 - this statement misses the point, which is whether "sensitive intelligence collection projects" should be reported to the Congress regularly. It cannot be argued that it is impossible to define such projects since both E.O.s 11905 and 12036 require special consideration for such activities. It is also difficult to argue that such activities should not be reported to the Congress since it is my understanding that this is being done now to one extent or another. Perhaps what we should do here is to conform our position to current policy in this regard. In any event, there is no evidence here that the intention is to avoid mislabeling of special activities, as is the implication of the para 48 discussion.

- Para 49 - it should be added here that in no event should our regulations be subject to the same treatment as implementing standards and procedures.

- Para 50 - the words "If it is necessary . . . , then at a minimum" should be deleted and the purposes of the following sentence accomplished by recommending the insertion, after "factors" in 131(c), of "based upon a submission from the entity responsible for conducting the activity, which shall include, but not be limited to -"

- Para 50 - 131(a) should provide a seat on the NSC for the head of CIA if other than the DNI.

- Para 51 - the argument that it is unreasonable to require the creation of written records concerning special activities and their approval at the "highest levels of the U.S. Government" is simply not a tenable one since proper review and accountability is such a prime purpose of this bill. The Hughes-Ryan Amendment, 22 U.S.C. 2422, uses a standard of "important" to the national security.

- Para 52 - same comment as to records of review and accountability.

- Para 56 - "appropriate" committees of Congress in 131(i) should be instead "the select committees named in subsection (g)."

- Para 57 - "report" at the end of 131(j) should be "finding."

- Para 61 - add after "(i.e., if they are under cover)," "and other persons who may contribute articles to professional or trade publications regularly."

- Para 62 - add after "into the United States," "or buying a book or newspaper in the U.S." 132(a)(4) should be modified further by substituting for from "such support" on, the words "the involvement of the U.S. Government is publicly acknowledged." Street maps provided to the U.S. Olympic team, for example, will cause them less difficulty in Moscow if stamped "U.S. Government" rather than "CIA."

- Section 132(a)(5) - as with (a)(4), "such support," etc., should be deleted from the end of this section and replaced by "the involvement of the U.S. Government is publicly acknowledged."

- Para 63 - the words "fully informed and cooperating" should be inserted in the second sentence of this comment before "United States."

- Para 64 - it should not be argued that 132(c) should be modified because it would otherwise not allow use of "pressure or other form of restraint" as to U.S. persons. The last two sentences should read: "As written, it will inevitably generate questions after the fact concerning whether persons who agreed to provide assistance did so in a purely voluntary manner and whether their consent was adequately recorded. Requiring full disclosure of the nature of the activity and likely risks should be sufficient to protect such persons and the requirement for voluntary consent as well should be deleted."

- Para 66 - drop the phrase beginning with "at a minimum..." along with "however" and "then" in the next sentence. The suggested amendment should be recommended at the end of 132(e) and should read: ", the reimbursement only of expenses incurred in the course of the voluntary acquisition of information, or any overt, nonoperational relationships which either party may acknowledge publicly." The last two sentences should be dropped.

- Para 67 - the point should be made more strongly here that the original scope of the provision which is now 132(f) was not limited to any class of persons. As it appeared in Section 157(e) of Title II in previous drafts, now Section 244 "Undisclosed Participation," its intention was to allow recruitment, etc., notwithstanding the bar on undisclosed participation, by persons employed by an academic institution, and, in later drafts,

by persons employed by any organization. When it was moved to Title I and altered to fit into 132 the addition of "described in subsection (a) or (b)" substantially, and hopefully inadvertently, narrowed the allowance. That limitation must be removed or every recruitment source, excluding clergy, journalists, and exchange program participants, may be deemed to be a form of unauthorized "undisclosed participation" under 244 by the Agency. If necessary to clear this up, 132(e) as modified should be moved to become 244(e).

- Para 69 - the second sentence of the first paragraph should read, in part: "... in subsections (a), (b), (c) and (d) before 'because of such official's office or position': 'knowing such person to be a foreign official and'" In the second sentence of the second paragraph the words "or military" should be inserted after "non-military," and it should be noted also that persons involved in properly authorized special activities of a paramilitary nature, assuming a future need for such actions, or non-"combatants" who are serving as technical advisers, etc., should not have to risk committing "assassination" in carrying out their duties. The last paragraph should have "(a), (b)" added before "(c) and (d)."

- Para 70 - it should also be pointed out that 135(a)(1), (2) and (3) will effectively rule out paramilitary-type special activities, even if acknowledged as necessary and properly authorized by all parties, including Congress, since such operations, by their nature, will result in (2) and (3) to some degree, and may meet the definition of "international terrorist activities."

- Para 72 - "too broad" should replace "unclear" in the first sentence. There should be added at the end of the second sentence "and should not bar legitimate requests for assistance from entities which are properly authorized to perform such functions. The provision as written would bar, for example, CIA from requesting FBI collection of foreign intelligence in the U.S. through electronic means, even though the FBI is authorized to do so, under 507(a) and (b), because CIA is not authorized to conduct such activities."

- Para 73 - the words "outside the Agency" should be inserted after "reporting." The next sentence should state simply "Furthermore, ... regulations, the 'Civil Service Commission' should be substituted for the 'Attorney General' throughout 138. As to the second paragraph, there should be a reporting system which requires top-level officials, (DNI, DDNI, ADNI, DCIA, perhaps DDs, LC, GC, and IG, etc.) to report to CSC, but all other Agency employees (perhaps ODNI also) should only report inside CIA (or ODNI). Employee reports should not go to the CSC or other central reporting point, and should not be made available to the public. There should be a CIA system of reporting which parallels the CSC system, and the CIA system and reports should be open to audit and review by cleared CSC officials. The issue is not merely waivers for "cover" employees, but the application in this

area of the authority to withhold names, etc., of CIA employees generally. The late CIA phone book, though only listing overt employees, was Secret. There should not be a roster of CIA employees and their financial status available for the public.

- Para 74 - same as para 73. These reports should not be publicly available under FOIA whether concerning cover or not.

- Para 75 - the last sentence should read, in part, "... under section 139 in order to proceed without formal acknowledgment to appropriate officials of the fact that a minor portion of the routine procurement is destined for the CIA"

- Section 152(d) - should be revised as follows:

- (d) The Director shall, in accordance with 44 U.S.C. 3101, be responsible for maintenance of records containing adequate and proper documentation regarding the national intelligence activities of the U.S.; and the head of each entity of the intelligence community shall similarly be responsible regarding the intelligence activities of such entity.

- Para 81 - the suggestion that reporting be limited to "serious" violations is not likely to be successful. Perhaps an alternative would be to limit this reporting to violations of regulations, etc., implementing this Act.

- Para 85 - there is no requirement in 152(b) of a written report.

- Para 86 - the end of the suggested amendment to 152(e) should read: "... are submitted to the Archivist for approval."

- Para 88 - "that relates to" should be added to the amendment of 153(b) before "intelligence."



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Attachment

United States Person

- a. a citizen of the United States;
- b. an alien lawfully admitted for permanent residence, provided that an alien outside the United States may be presumed not to be a United States person until information to the contrary is obtained and provided, further, that an alien known to have been admitted for permanent residence may be presumed to have lost status as a United States person after one year of continuous residence outside the United States until information indicating an intent to return to the United States as a permanent resident alien is obtained;
- c. an unincorporated association organized in the United States or substantially composed of United States citizens or aliens lawfully admitted for permanent residence; provided that unincorporated associations outside the United States may be presumed not to be United States persons until information to the contrary is obtained; or
- d. a corporation incorporated in the United States. A corporation or corporate subsidiary incorporated abroad, even if partially or wholly owned by a corporation incorporated in the United States, is not a United States person.

A person in the United States shall be presumed to be a United States person unless information to the contrary is obtained.